Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE FORMULA PROCEDURE OF ROMAN LAW.*

The formula itself remains to be described in the words of the classic text of Gaius:[77]

"The formula consists of these parts: (1) the *'demonstratio'*, (2) the *'intentio'*, (3) the *'adiudicatio'*, and (4) the *'condemnatio'*.[78]

"The *'demonstratio'* is that part of the formula which indicates the nature of the suit as in the following example: Whereas A. Agerius sold a slave to N. Negidius;[79] or, Whereas, A. Agerius deposited a slave with N. Negidius.[80]

"The *'intentio'* is that part of the formula which states the claim of the plaintiff; thus: If it appears that N. Negidius ought to deliver to A. Agerius ten thousand *sesterces;* or thus: Whatever appears that N. Negidius ought to deliver to A. Agerius; or thus: If it appears that the slave belongs to A. Agerius by the law of the *Quirites*.[81]

"The *'adjudicatio'* is that part of the formula which permits the *Iudex* to adjudge a thing to one of the litigants as in the case of partition between heirs. . . .[82]

"The *'condemnatio'* is that part of the formula which permits the *Iudex* to condemn or absolve: thus: *Iudex,* condemn N. Negidius (to pay) A. Agerius ten thousand *sesterces.* If it does not appear absolve him. . . ."[83]

Gaius then proceeds to discuss the question of what parts of the formula are concurrent, the character of formulae based on *'ius'* (civil law) or *'in factum'* (based on the praetorian edict), and other details concerning the construction of various parts of the formula and their effect on litigation which need not be

*Continued from the March Issue, page 355.

[77] The detail of the actions does not fall within the scope of this paper. For that, see especially, BEKKER "DIE AKTIONEN DES ROM. PRIVATRECHTS" (2 vols.) Berlin 1871, 1873.

[78] INST. iv, 39.

[79] Aulus Agerius and Numerius Negidius, *'actor'* (plaintiff) and *'reus'* (defendant), respectively, were the John Doe and Richard Roe of Roman law.

[80] INST. iv, 40.

[81] INST. iv, 41.

[82] INST. iv, 42.

[83] INST. iv, 43.

noticed in this discussion. The particulars may be passed over with the observation that the formula procedure was fully adapted to the varied needs and contingencies of litigation. It involved that elaborateness of detail which is associated with a system of law dealing with the complicated transactions of a state whose commerce extended over the wide empire attained by Rome at the end of the Republic.

The very important fact must here again be stressed that with the formula procedure, Rome was able to administer justice to the whole civilized world with fewer judicial magistrates than are found in many single courts of record in metropolitan centers in the United States. What is the explanation? Did Rome have an inferior law? That question is foreclosed by the fact that Roman law even today is the only serious competitor of the Germanic law which we have inherited.[84] But perhaps it may be said that admitting that the Roman law of the books is a refined and advanced system, yet the administration of justice was bad. Cicero's orations against Verres who was *praetor* in Sicily, give a striking picture of the great powers vested in the judicial magistrate, and, in this instance, of the grossest kind of judicial corruption and administrative brigandage.[85] The literature of the age is full of complaint of bribery in the trial of cases. The speeches of the *'patroni'* both in civil as well as in criminal cases were described as *'canina eloquentia'*.[86]

[84] To say nothing of the *quantum* of Roman law which has entered the Anglo-American system. Cf. WILLIAMS "INSTITUTES OF JUSTINIAN" London 1893.

[85] After Cicero's first speech, Hortensius, his adversary, seems to have been so put to it for a defense, that Verres retired into voluntary exile. Five remaining orations of the series, all of which are important in throwing light on Roman procedure and which show amazing industry on Cicero's part (which in his usual self-approving fashion he is not slow to admit), were never delivered. See especially VERR. ii, 1.

[86] Cicero's civil as well as his criminal trials show many surprising illustrations of descent to unmitigated abuse. See the frequent turns on the name "Verrès" (boar) (VERR. ii, 46; iii, 7), the reference to Fanniûs with the "cropped head": "Does not his very head and those eyebrows entirely shaved appear to reek of wickedness and to exhibit cunning?" (PRO ROSC. COM., 7, 20); to Aebutius "the attorney of women and the joke of men" (PRO. CAEC., 5, 14). It may, however, be recalled that a contemporary of Cicero's has well described his talent for dealing with cases turning on fact—*nihil hoc ad ius; ad Ciceronem*: 'CIC. "TOP.", 12, 51.

Where bribery is not suggested we find attorneys (*patroni*) addressing the judges by name and resorting to the crudest sort of flattery to gain favor.[87] These things and many others may be said of Roman administration of justice.[88] Can anything be brought forward to soften the impeachment?

The picture is entirely overdrawn. If Rome had a Verres and a Dolabella, what of the long list of *praetors* who administered the formula system of procedure over a period of nearly five hundred years? Not all of these, forsooth, were legal saints. Not all were jurists of rank. Yet it stands out clearly and the fact is universally attested that this magistracy produced a body of law which exhibited a legal genius which has lived through twenty centuries. It will be quickly answered: admitted; but there is the contrast between the law in the *praetor's* album and the law actually administered to litigants. Before that point is met, it may be profitable to inquire, by way of counter-irritant, how far in our own system, in the main, satisfactory rules of law which may be read in the reports are perverted by oratory and other adjuvants for discovery of the minor premise, in the interval between rule and judgment. That inquiry will not be pursued with complacency. But, to return to the point, it may be suggested that the orations which have come down to us, valuable as they are for our purpose, are likely to give an erroneous impression of the real merits of the Roman formula procedure.

First of all, the most striking of the orations, as for example, the *'pro Milone'*, like our State trials, relate to criminal cases. If in a future, far-removed age, one read the accounts of trials

---

[87] One of the most conspicuous instances is Cicero's defense of the case of Ligarius which was tried before Cæsar. Ligarius was acquitted whether because of Cicero's flattery or Cæsar's native generosity, does not appear. Cf. also P. REGE DEIOTARO.

[88] One writer has suggested, mistakenly, as we believe, of Roman procedure that "jest supplied the want of authority. . . . Rhetoric and logic had not then, as with us, distinct and separate domains. . . . But we must not forget the difference between the tribunals in the two countries. The Roman *iudices* were . . . much more like jurymen than judges, and therefore liable to be imposed upon by fallacies, which, if addressed to an English court, would render the counsel who propounded them, merely ridiculous": FORSYTH "HORTENSIUS", 87.

of persons accused of crime in our own era, one would not necessarily get an accurate idea of our civil procedure in law or in chancery. A more accurate measure of Roman civil procedure will be obtained by inspecting the speeches delivered in civil trials, and here we think a comparison with addresses to juries in our own time will not be altogether favorable to us. It would be difficult to imagine an advocate making quite the address to a common law jury delivered by Cicero in the cases of Caecina, Roscius the actor, or Quinctius.[89]

In the next place the speeches delivered before the trial courts do not give an adequate notion of the procedure leading up to the construction of the formula. Rhetoric and oratory are inseparable companions in any discussion of facts, but there is no reason to believe that the procedure *'in iure'* (i. e. before the *praetor*) was any less wanting in seriousness of argument or unadorned directness of statement than a common law hearing of a demurrer.

It will be recalled that at Roman law, procedure was sharply divided into two stages: first, the parties appeared before the *praetor* where the plaintiff informed the defendant of his claim and upon which he then requested the *praetor* to grant an action (*'actionis postulatio'*).[90] In certain cases, the plaintiff might interrogate the defendant to avoid the pitfalls of an improper claim.[91] The defendant brought forward his defenses and then the *praetor* either granted or refused the action, or granted the action modifying the formula to meet the defenses urged by the defendant.[92] There were formulas already devised for all sorts of cases and where a new one was needed the *praetor* devised it at the hearing.[93] The procedure up to the point of the formula was entirely oral and due no doubt to this fact, the

[89] Greenidge, speaking of the *iudex* says he "must be, not a man of average enlightenment with a common sense estimate of evidence, but a juristically trained man with a capacity for dealing with subtle points of law. . . .": "Leg. Proc.", 150.

[90] Cic. Epist., 655 (*ad Famil.*, 5, 10); pro Quint. 20, 64.

[91] For the detail, see Keller-Wach "CP", 259.

[92] Greenidge "Proc.", 178 *et seq.*

[93] Cicero adverts to the multiplicity of formulas: Top. 8, 33; Beth.-Holl. "CP" II, 303, 323.

praetor was able to discharge a large volume of business with remarkable expedition.[94] This procedure is comparable to the practice on motions in our own law. The chief function and the high value of this procedure before the *praetor,* lay in the fact that the actual issues of law and fact were arrived at in a natural way without ceremony or undue formality.

Here, again, another comparison may be made. When the pleadings are written, it is human nature and perhaps also good pleading to veil the issues by all the safeguards of multiple counts and pleas and legal verbiage which aims to disclose as little as possible which might be prejudicial and which claims everything that may be of advantage. The only virtue left in common law pleading is that by it the pleaders manage under the rules of the game to maneuver each other into a series of negative positions. When the same controversy is presented on oral argument before the court of last resort all this artificiality disappears and counsel are willing to discuss the controversy in its actual outlines instead of seeking each in his turn to construct a legal phantasm which shall be immune from the magic of his adversary.[95]

Great allowance must be made for the dignity of the *praetor's* office in accounting for the remarkable results achieved in administration of Roman justice. The Roman *praetor* by virtue of his *imperium* was attended by six *lictors* carrying the *fasces.*[96] The powers of the *praetor* summed up in the words *'do, dico, addico'* were the most extensive ever conferred on a civil magistrate in any country in the administration of justice.[97] He was not only the law-giving judge, but, for practical purposes, he was also the court of last resort since there was no appellate jurisdiction in the modern sense.[98] Before a magis-

---

[94] Cf. the remarks of Greenidge on the rapidity of the procedure: 'PROC.", 181.

[95] Cf. the palaver procedure of the Kaffirs: EVOL. LAW SER. I, 302, 313.

[96] Williams "Droit Public", 277.

[97] It is true he was subject to the senate, but, as is seen in the case of Verres, the senate did not freely interfere even in cases of notorious wrongdoing: VERR., V, 39.

[98] BETH.-HOLL. "CP" II, 700 *et seq.*

trate of such extensive powers surrounded by the visible trappings of high office, it was unlikely that either parties or *cognitors* would attempt to make a jest of the law or of the court. There was no toying with words; there was no mere ceremonial. The *praetor* was not a *pontifex* functioning with religious mysteries. There was no symbolism. An inspection of the praetorian edict shows a pointedness of style which must have been characteristic of his judicial procedure.[99]

The formula itself was reducible to simple elements—*'si paret condemna; si non paret absolve'* (if these facts appear condemn him; if they do not appear absolve him). When the formula which incorporated the essential facts concerning the plaintiff's case and the exceptions of the defendant, was constructed, it was delivered to the plaintiff. From this point we reach the second stage of the procedure. All issues of law have not been settled, at least theoretically, and the questions of fact have been reduced to their simplest terms.[100] In actual practice, however, we believe the widest discretion was necessarily allowed to the *iudex* within the limits of the issue. The very important difference between the instructions given in a civil law-suit to a common law jury and the instructions given to the *iudex* show clearly two things: (1) that the *iudex* must be one trained in the law in order to be able to apply the formula, or that he must be assisted by lawyer assessors and, (2) that since the *practor's* directions to the *iudex* were couched in general terms, the office of *iudex* was in the truest sense a

[99] See LENEL "DAS EDICTUM PERPETUUM"; GIRARD "TEXTES", 137 *et seq.* The *praetor* was invested not only with judicial, but also with various administrative and military powers. He was elected for one year and at the beginning of his term it was customary to post for the information of litigants a list of formulas for extraordinary legal remedies (*interdicts*), procedural *sponsiones*, actions, and exceptions. These formulas were accompanied by a statement of the rules by which the praetor would be governed during his term. This statement was known as the *'edictum perpetuum'*. See SOHM "INST." § 14. It may be ventured that where evils crept into the praetorian office it was due not to his peculiarly extensive powers in making (in effect) the law and in passing on the merits of concrete cases but rather in vesting him with administrative powers unconnected with litigation.

[100] Cf. CIC. PRO PUBLIO QUINTIO which gives a clear illustration of this principle.

judicial office.[101] The *iudex* bore more resemblance to a referee or a master in chancery than to a juryman; but there was this important difference that the *'sententia'* of the *iudex* unlike the findings of a master or referee, was final. It is therefore entirely proper to speak of the *iudex* as a judge notwithstanding the fact that he did not enter into the official system of magistracy.

The formula was delivered to the *iudex* in the presence of both parties and the case was explained to him in an introductory way.[102] The case was now ready for trial and it appears that these trials were very expeditiously carried out. The old rule of the Twelve Tables [103] that a trial must be completed before the setting of the sun seemed still to prevail in letter in the time of Cicero.[104] When the trial was ended the *iudex* pronounced his *'sententia'* orally [105] in the presence of the parties, and this sentence was unalterable, and conclusive (*res iudicata*) on the parties.

Many of the legal institutions of the Romans were strikingly original but perhaps none of these more so than the system of procedure. Few of these characteristically Roman legal ideas have survived in the modern world. The pontifical procedure represented Rome as an agrarian commonwealth. It partook very largely of the stock of ideas and methods current in the world at that level of development. The pontifical procedure was succeeded by the formula procedure and at this stage Roman national development reached its maturity. Roman pro-

[101] See the formulas set out by GAIUS iv, 39-51. Thus, "if it be proved that A. A. ought to transfer"; "if it be shown that such and such a patron was summoned to appear by such and such a freedman against the edict"; "if it be shown that A. A. deposited a silver table with N. N. and that by the fraud of N. N. it has not been restored, do thou *iudex* condemn N. N. to pay A. A. the value of the table". It is perefectly evident that instructions to a jury would not be framed in this wide-open fashion. Cf. CIC. TOP. 17; BEKKER, "ACTIONEN" II, 161 *et seq.*

[102] *'Causae conicctio':* GAI. iv, 15.

[103] GELL. xvii, 2.

[104] CIC. PRO QUINTIO, 10. By the *lex Iulia iudicaria, iudicia legitima* were limited to eighteen months after commencement, and magisterial actions were limited to the period of office of the *praetor* by whom the *iudex* was appointed: GAI. iv, 104-105.

[105] KELLER-WACH "CP", 335.

cedure was as distinctively a national product in the formula era as was the rigorous régime of *patria potestas* and agnation. The next stage was the flowering period, but the virile national seed had become pollinated with a weaker strain, and this inferior stock has come down to us as Roman law. In procedure, the robust, outspoken and self-sustaining procedural methods of the republican era were replaced by a dependent, state-sustained literary procedure in which many of the ancient virtues were obliterated and through which many of the evils that now surrounded the administration of justice were introduced.[106]

This rapid survey of some of the leading features of the formula procedure we think justifies the following conclusions:

1. It was expeditious in framing issues of law and fact. In large measure this was due to the fact that the proceedings before the *praetor* were oral. From summons to judgment there was only one element which was written—and that was the formula itself. Another factor promoting expedition was the dignity of the magistrate. Under the Roman system the highest magistrate in the state officiated at the most important point in any litigation—the determination whether an action should lie and under what conditions it should go. In contrast with this, we expect that legal disputes will automatically filter through a paper strainer of written demurrers and pleas, in which scientific operation both sides do their utmost to spoil the experiment.

2. It was expeditious in arriving at the real controversy and in stating the conditions for its disposition. This was due to the fact that the *practor* unlike the judge of modern law, was not a mere spectator of a legal quarrel. The *praetor* framed the issue (or permitted it to be framed in his presence) and it was not left to the parties to come into court with such concealed weapons as a declaration on the common counts, and the

[106] The formula procedure was replaced by bureaucratic procedure (*'cognitio extraordinaria'*) A. D. 342 by the Emperors Constantius and Constans. Every alleged reform bases itself on alleged evils. It was so here—"Legal formulas with all their syllabic traps are hereby completely abolished." (C. 2, 57, 1)—and thus ended one of the most interesting periods of legal history.

like, or such a featureless abstraction as a plea of general issue. The precise controversy was made known to the court and that precise controversy was committed to the *iudex* for hearing. All this was a matter of a few moments in a court of the dignity and power of the *praetor,* and not of weeks and months as under paper pleadings. It may be added that a Roman court never tried a record.

3. It was expeditious in that the highest judicial officer in the state presided at the first stage making an appellate procedure unnecessary.

4. It was expeditious in that irrelevant matters were eliminated at the outset. In any lawsuit, however simple, there are many matters which make up the chain of facts, which can be disposed of without the necessity of proof. It is common knowledge that in the trial of modern cases a large amount of time is wasted in proving facts that are not in good faith disputed. These irrelevant matters do not automatically go out of a case, and they are more easily extirpated at the beginning of a controversy, that is to say, when the lines of attack and defense are being shaped under the eye of an active magistrate quick to see and reprove evasion and bad faith, than in the later stage of trial when the issues are already fixed.

5. It was expeditious in providing for quick trial of cases. There was a standing list of many hundreds of competent persons in Rome registered in the *praetor's* album from whom the parties might make a selection for *iudex*. There were no clogged trial calendars in Rome. The judicial system was wholly flexible, and however great the pressure of legal business it was possible to keep abreast of it for centuries with one or two magistrates with a complement of a large list of private *iudices*.

6. The Roman division of the judicial function (*'ordo iudiciorum'*) into a division *'in iure'* (before the *praetor*) and *'in iudicio'* (the trial before the *iudex*) had the merit of keeping the law close to the people. Roman citizens were able to see that the law was in their own custody and if there was any defect in the concrete administration of justice, it was apparent to

them that these defects were those of human nature itself and that the state could not be held accountable for individual failures of justice. The rationale of the Anglo-American jury system in civil trials is based principally on this factor,—the participation of the people in the chief activity of the state which promotes social concord. Doubtless the jury system also has the merit of introducing an element of sentiment and emotional incoherence with the administration of justice to mitigate the rigors of the law.[107] In the jury system it is often asserted that the best juror is he who knows nothing about the case or anything else. The Roman *iudex*, on the contrary, was a man of worldly experience, of learning, and of social position (a senator or a knight). In a society not based on class distinctions the last qualification would be regarded as superfluous and even dangerous, and justly so; but the class distinctions of Roman law in the virile period of the republic were not based merely or chiefly on economic privilege, but on qualities of leadership. The office of judge was not so much a power as a *'munus publicum.'* [108] The caste qualifications required of the Roman judge while instinctively repellent to our sense of democracy and to our habitual tolerance of the insufficiencies of the jury system in civil trials, were based primarily on a social regimentation which though picturesque in its day has now passed over the stage. This fundamental basis of Roman society was the relation of patron and client [109] an institution with a long background in Aryan history,[110] the effects of which are written on every page of Roman history. This institution accounts for the long struggle concerning the acceptance of advocates of fees for legal services.[111]

Whatever else we may conclude about Roman procedure in the formula stage of development there is no denying its rapid-

[107] See HOLMES "COLLECTED LEGAL PAPERS", 238.

[108] KELLER-WACH "CP", 51.

[109] Maine has shown how the Roman law status of slavery was more humane to the slave than the Anglo-American concept based on property: "ANCIENT LAW" (10th Eng. ed.) Cap. v, 170.

[110] Duties to clients were a *'fides'* relation: See Leist in EVOL. LAW SER. II, 487.

[111] See SHERMAN "RL" II, 906.

ity [112] and its remarkable external simplicity. It satisfied the needs of the Roman people and its allies during the greatest, the formative period of Roman history. How much or how little of this system could be transplanted into the judicial systems of the present day with any prospect of legislative reception or practical success in operation, is not here in question.

Albert Kocourek.

NORTHWESTERN UNIVERSITY SCHOOL OF LAW.
Chicago, Ill.

---

[112] When it is recalled that jurisdiction was ordinarily restricted to *'dies fasti'* and that there were only about fifty days in the year when there was a certainty of being able to sue for a formula, the speed with which legal business was dispatched seems very near unbelievable. Some allowance must be made for the *'dies comitiales'* which Mommsen computes at one hundred and ninety-four, when judicial business could be transacted. See GREENIDGE "PROC.", 137; BETH.-HOLL. "CP" II, § 80.